No. 06-157

IN THE

Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, et al.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR LEGAL AND RELIGIOUS HISTORIANS AND LAW SCHOLARS PAUL FINKELMAN, JOYCE APPLEBY, CARL T. BOGUS, ERWIN CHEMERINSKY, NORMAN DORSEN, RONALD B. FLOWERS, EDWIN S. GAUSTAD, STEVEN G. GEY, BETH SIMONE NOVECK, ROBERT M. O'NEIL, EDWARD A. PURCELL, JR., FRANK S. RAVITCH, NADINE STROSSEN, LAURA UNDERKUFFLER, AND SAMUEL L. WEBB AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal and religious historians and law scholars who teach or have taught courses in American and British legal history, American and British constitutional history, constitutional law, First Amendment law, religion and the law, seventeenth, eighteenth, and nineteenth century American history, and in related areas in law schools and undergraduate and graduate schools across America. They have written and edited books and written articles in scholarly journals on related issues.

Amici file this brief in support of the Respondents' challenge to the President's Faith-Based and Community Initiatives program. We believe, based on our training and study as legal historians and law scholars, that there is no historical basis or support for the Government's claim that the President's program should be insulated from judicial review.

Amici's names and institutional affiliations (listed for identification purposes) are as follows:

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Government's account of the pertinent historical record is incomplete. When the Government mentions history in its brief, it does so by referring to isolated statements, without reference either to the larger historical context or even, in some cases, to other statements made by their sources. By way of example, the Government points to the remarks of a Continental Congress from long before the most important debates on religious liberty under the new Constitution were waged (*e.g.*, Pets.' Br. at 39) (quoting the Continental Congress in 1778). The Government also relies on support from both Thomas Jefferson and James Madison (*e.g.*, Pets.' Br. at 37), both of whom spoke directly against the positions the Government takes in its brief. And the

Government argues that the Framers "focused narrowly on the fear that *Congress* would use its power forcibly to transfer funds from taxpayers into the coffers of churches" without asking or attempting to answer whether that was because the Framers would have preferred the President to do so (Pets.' Br. at 41) (emphasis added). As this brief will explain, the answer to that question is "no." *Amici* hope the Court may benefit from a broader historical view that places the issues at the heart of this case in context.

The history of the Establishment Clause forms a critical piece of the analysis in this case. In *Flast* v. *Cohen*, this Court held that a person has standing to sue based on status as a taxpayer to challenge the expenditure of funds by Congress in violation of the Establishment Clause. 392 U.S. 83 (1968). In *Flast*, the Court looked to the historical purpose of the Establishment Clause as a limitation on Congress's spending power. That historical purpose provided the basis for creating an exception to the usual bar against taxpayer standing to help prevent "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption[:] . . . that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103.

The Government argues that respondents lack standing because this case involves discretionary expenditures by the executive of funds not earmarked by Congress for any specific purpose. For support, the Government argues that *Flast* linked taxpayer standing to an historical concern specifically about *legislative* funding of religion. The Government purports to identify a consistent thread running through *Flast* and its progeny holding that "taxpayer standing . . . was designed to protect against 'abuses of *legislative power*.'" (Pets.' Br. at 21) (quoting *Flast*, 392 U.S. at 106) (Petitioners' emphasis). Alternatively, the Government argues that standing fails in challenges to tax dollars spent only "internally" — that is, not on any particular private group. The

Government argues that, because "the Executive [does] something other than disburse funds" (Pets.' Br. at 29), respondents are in essence challenging the use of federal funds admittedly in support of religion but "incidental" to "the administration of an essentially regulatory" program. *Flast*, 392 U.S. at 102.

The Government's arguments are incorrect. The history of the Founding demonstrates a grave concern about interference by the federal government with religion. At the time of the Founding, history had shown that the danger of such interference lay in the fact of funding itself — it depended upon the identity of neither the benefactor nor the beneficiary. In fact, the origins of "establishment" in England lay with the monarch, not with Parliament. It is therefore highly unlikely that the Framers would have been indifferent to threats of establishment created by the executive branch. On the contrary, the Framers designed a government of limited powers in which the power of the purse and the power to make the laws were vested entirely in Congress. Knowing that these were the powers that made state-established religion possible, the Framers expressly secured religious liberties under the Establishment Clause from the reach of Congress. In doing so, they believed that they had removed any possibility of interference from the federal government in religious matters, thus satisfying Anti-Federalist demands that religion remain a local issue. The historical record strongly indicates that neither expenditures by the executive nor those supposedly "internal" to the government were meant to be outside of the Constitution's protections.

ARGUMENT

I. THE FRAMERS WOULD NEVER HAVE CONTEMPLATED OR APPROVED OF EXECUTIVE SPENDING IN FURTHERANCE OF RELIGIOUS PURPOSES.

A. The British Monarch Played a Vital Role in the Religious Establishment and Religious Persecution in England.

The historical study of the danger of state-established religion begins with the executive branch: the Church of England was initially established by a monarch, not by Parliament.[2] In 1534, King Henry VIII broke from Rome and the Catholic Church, established the Church of England, and declared himself "Supreme Ruler of Church and Kingdom."[3] After his death, the fate of the Church of England hung on the favor of the current monarch, as the religion of the nation fluctuated in accordance with the religious affiliations of the Roman Catholic Queen Mary and the Protestant Queen Elizabeth I.[4] The very existence of the Church of England was contingent on the desire of the current monarch.

Although the monarchs sought conformation from Parliament through the Act of Succession in 1534 and subsequent acts of conformity, suppression of religious nonconformity came primarily at the hands of the crown. In their efforts to enforce their religious prerogative on their subjects, these monarchs employed a plethora of oppressive methods:

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[2] *See* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1404–05 (2004) (describing the establishment of religion in Britain from the reign of Henry VIII through George I).

[3] 1 William Blackstone, *Commentaries* *230, *269.

[4] *See* Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 Alb. L. Rev. 91, 144–45 (1998); *see also* Esbeck, *supra* note 2, at 1408–14.

forbidding those not of their religion from holding office,[5] creating ecclesiastical courts to try crimes against the state religion,[6] allowing the practice of only their religious beliefs,[7] and imprisoning and even executing religious dissenters.[8] The monarchs were empowered to correct "the ecclesiastical state and persons, and . . . all manner of errors, heresies, [and] schisms . . . ."[9] Parliament acted in concert with the crown, enacting laws such as the Test and Corporation Acts,[10] which restricted office-holding in government, the military, public corporations, and academic positions to members of the Church of England.[11]

In addition to choosing and implementing a national religion, the British monarchs also had a substantial role in defining the substance of Church doctrine and liturgy. The monarch was the final arbiter of doctrinal questions[12] and chose bishops,[13] and both Henry VIII and Elizabeth I took the title of Supreme Leader of the Church.[14] A figurehead,

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[5] *See* Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 Am. J. Int'l L. 593, 612–13 (1997) (describing the continuing though lessening impact of the Test and Corporation Acts of 1673).

[6] *See* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099, 1127 (2004) (describing the High Commission and ecclesiastical courts formed by Henry VIII, and their role in "enforc[ing] spiritual uniformity on the people.").

[7] *Id.* at 1141.

[8] *See* Franck, *supra* note 5, at 609–11; Hamilton, *supra* note 6, at 1141–51.

[9] 1 Eliz. 1, c.2 (1559) (Eng.).

[10] *See* 13 Car. 2, st. 2, c.1 (1661) (Eng.); 25 Car. 2, c.2 (1672) (Eng.).

[11] *See* John Witte, Jr., *Religion and the American Constitutional Experiment* 14–19 (2000); Michael W. McConnell, John H. Garvey & Thomas C. Berg, *Religion and the Constitution* 21–24 (2002).

[12] 1 Blackstone, *supra* note 3, at *269 ("In virtue of this authority the king convenes, prorogues, restrains, regulates, dissolves all ecclesiastical synods or convocations.").

[13] *Id.* at *365–69.

[14] *Id.* at *269.

drafter of doctrine, and appointer of bishops, the British monarch was consistently and intimately involved in the establishment and development of the Church of England.

Even after the "Glorious Revolution" of 1688–89 shifted the locus of power in British government, resulting in a more circumscribed monarch and a more empowered Parliament, the monarch retained substantial control over religious matters. The monarch still appointed bishops[15] and maintained his position as the ultimate authority on ecclesiastical questions.[16] A parson or a vicar could lose his post for "maintaining any doctrine in derogation of the king's supremacy, or of the thirty nine articles, or of the book of common prayer . . . ."[17] As William Blackstone noted in his *Commentaries*, "Upon the whole therefore I think it is clear, that, whatever may have become of the nominal, the real power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired."[18] Despite granting control over certain aspects of the Church to Parliament, such as determining the text of the Book of Common Prayers, the monarch therefore retained important powers.[19]

The Framers were fully aware of this history and would not have been indifferent to the threat of executive establishment in this country.[20] On the contrary, the role of the

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[15] *Id.* at *367 ("After [appointment], the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only."); *see also* J.C.D. Clark, *English Society 1660–1832*, at 55 (2d ed. 2000).

[16] 1 Blackstone, *supra* note 3, at *269.

[17] *Id.*

[18] *Id.*

[19] *Id.* at *325–26.

[20] *See* Esbek, *supra* note 2, at 1419–20 (describing the Framers' awareness of and concern due to religious persecution in England); *see also* Hamilton, *supra* note 6, at 1141 (same); James A. Campbell, Note,

monarchy in establishing the Church of England — and in perpetuating the attendant religious persecution Americans feared — was so fundamental that a prohibition on establishment by a legislative body only, and permitting such establishment by the executive, would have been unthinkable to the Framers.[21]

By the same token, the Framers' experience had demonstrated that a close intertwinement of legislative and executive functions together infringed on religious liberties. Members of the founding generation were acutely aware of the evolution of the Anglican church into the Church of England during the sixteenth and seventeenth centuries at the instigation of the monarchy, and the subsequent interplay that existed between the crown and Parliament.[22] It is therefore unlikely that those of the founding generation would have distinguished between legislative and executive functions or viewed the latter as less apt to violate freedom of conscience.

Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 Akron L. Rev. 541, 545–46 (2006) (same).

[21] The dangers of a monarch with free reign over religious liberty were well understood by the Continental Congress in 1774 when it attempted to persuade colonists in Quebec to join in resistance to the Crown. "Such is the precarious tenure of mere *will*, by which you hold your lives and religion. The Crown and its Ministers are empowered, as far as they could be by Parliament, to establish even the *Inquisition* among you." 1 *Journal of the Continental Congress* 109 (Ford et al. eds., 1774).

[22] *See* Comments of James Iredell, Debates in the Convention of the State of North Carolina, July 30, 1788, 4 *Elliot's Debates* 193 (discussing the Test and Corporation Acts).

B. The Structural Design of the Constitution Foreclosed the Establishment of Religion by the Executive Branch.

1. The Framers Created a Government of Limited Powers.

The Framers of the new Constitution established a government of limited powers. According to James Madison, "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[23] The Framers based their decisions about how to structure the new government in part on the lessons of the British experience, which demonstrated the havoc that could result from a state religion controlled by both a legislative body and the executive.[24] In doing so, they took careful measures to circumscribe the authority of the executive and legislative branches. Taken together with the First Amendment, these circumscriptions foreclosed the ability of either branch to use tax monies to promote religion.

2. Structural Limitations on Executive Power Made "Establishment" Impossible.

Although the Framers carefully allocated power among the branches of the federal government, they expressed relatively little concern about the possibility of the President es-

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[23] The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). This arrangement was universally understood. In explaining why South Carolina should ratify the Constitution, General Charles Cotesworth Pinckney explained at that "it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states." Comments of Charles Pinckney, Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution, Jan. 17, 1788, 4 *Elliot's Debates* 286. Pinckney's comments were in regard to slavery and reflect that the limited nature of the federal government's powers were critical to the southern states' accession to the new Constitution.

[24] *See* Comments of James Iredell, *supra* note 22.

tablishing religion. The reason was not indifference to that possibility but a firm belief that the Constitution's structure eliminated it. The Framers believed that structural limitations on the President's authority made establishment of religion by the Executive Branch impossible. Madison wrote that the President "cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it."[25]

Just as the President could not "make" laws establishing religion, nor could he raise independent money as a vehicle to establish religion. Unlike the British monarch at the time of the establishment of the Church of England, the president could not sell feudal land or impose feudal taxes to raise ready cash to fund such projects. During the Virginia Ratification Convention, Governor Edmund Randolph compared the theoretical president to the monarch in the English system, stating that the President

> "can handle no part of the public money except what is given him by law .... He can do no important act without the concurrence of the Senate. In England, the sword and purse are in different hands. The king has the power of the sword, and the purse is in the hands of the people alone. Take comparison between this and the government of England. It will prove in favor of the American principle .... In England, Parliament gives money. In America, Congress does it."[26]

The President, in fact, depended entirely upon appropriations from Congress to fulfill his duties. And the excruciatingly detailed early appropriations bills demonstrate quite

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[25] The Federalist No. 47 at 303 (James Madison).

[26] Comments of Edmund Randolph, Debates in the Convention of the Commonwealth of Virginia, June 10, 1788, 3 *Elliot's Debates* 201.

clearly that early presidents simply did not have access to discretionary funds. One early appropriations bill provided, for example: "For compensation to the Treasurer, clerks, and persons employed in his office, four thousand four hundred dollars. For expense of firewood, stationery, printing, rent, and other contingencies in the treasurer's office, six hundred dollars."[27]

Justice Story would later recognize the importance of this structural arrangement in his *Commentaries on the Constitution*. "The power to control, and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance."[28] He contrasted the arrangement with an unseemly alternative: "In arbitrary governments the prince levies what money he pleases from his subjects, disposes of it, as he thinks proper, *and is beyond responsibility or reproof*."[29]

Justice Story's analysis also recalls the English common law, under which the monarch could raise funds in any number of ways. Blackstone devoted an entire chapter to detailing the various sources and types of income the King received "to support his dignity and maintain his royal power."[30] Historically, the Crown's income derived from a wide variety of sources: the forests and any proceeds thereof, such as fines, shipwrecks, strays, fees paid by bishops, and feudal taxes.[31] By the time of the Founding, taxation income represented the bulk of the King's wealth. "The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of

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[27] Act of Feb. 5, 1796, ch. 1, 4 Stat. 445; *see also, e.g.*, Act of Mar. 14, 1794, ch. 6, 3 Stat. 342; Act of Dec. 23, 1791, ch. 3, 1 Stat. 226.

[28] 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342 (1833).

[29] *Id.* (emphasis added).

[30] 1 Blackstone, *supra* note 3, at *271.

[31] *Id.*; *see also* Clark, *supra* note 15, at 56–57.

new officers, created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation."[32] Though Parliament voted on the amount of this income for the life of a given king, the income went to the Crown, and the raising and collecting of the income was within the exclusive purview of the King.[33] The monarch was thus fiscally independent at the time of the establishment of the Church of England and remained flush with taxation income after the Glorious Revolution.

The American president was never intended to have such free reign over the national fisc.[34] Given the President's reliance on appropriations from Congress and the detailed nature of these appropriations, George Washington could not possibly have established the Office of Faith Based Initiatives independently. The Government's description of the nature of discretionary appropriations *today* obscures the fact that an early President could only have established the Office of

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[32] 1 Blackstone, *supra* note 3, at *324. *See also* Peter Jupp, *The Governing of Britain, 1688–1848*, at 34 (2006).

[33] *See* Clark, *supra* note 15, at 56–57. "The Civil List Act of 1698 transferred many powers of expenditure to Parliament, but allowed the king to retain revenue "for the purpose of government ... the most sensitive areas of expenditure, particularly as they were often used for political manipulation and were not really made accountable to the House of Commons until the 1780s." Richard Brown, *Church and State in Modern Britain, 1700–1850*, at 36 (1991).

[34] It is widely recognized that the realities of the modern administrative state compel less direct control by Congress over the funds spent by the executive branch. While the first appropriations bill, passed in 1789, ran one paragraph in length and appropriated a total of $639,000 to very specific purposes, in recent times, "as the federal budget has grown in both size and complexity, a lump-sum approach has become a virtual necessity." 2 General Accounting Office, *Principles of Federal Appropriations Law* 6-5 (3d ed. 2006). By necessity under modern realities, though "Congress retains, as it must, ultimate control over how much an agency can spend, it does not attempt to control the disposition of every dollar." *Id.* But the important fact is that, even today, Congress ultimately *controls* the destiny of every single taxpayer dollar.

Faith Based Initiatives by specifically *requesting* money for that purpose — a request that would surely have been denied on the grounds that a Congressional expenditure of resources dedicated to that purpose would violate the First Amendment.

In the limited circumstances in which the Founders perceived a potential for executive abuses against religious freedom, they provided protection. The evils of establishments had not historically been entirely limited to financial extractions and expenditures on behalf of religion. Establishment of state religion had also been enforced by awarding civil rights and privileges based on proper religious affiliation. Derived from the Test and Corporation Acts, colonial establishments in America commonly limited rights of public office holding to Protestants and imposed religious requirements that affected nonconformists' access to legal and political institutions.[35]

The Founders did away with this arrangement in the Constitution under the "Test Clause," which provided that "No religious Test shall ever be required as a Qualification to any Office of public Trust under the United States."[36] The extensive ratification debate over the Test Clause indicates that the founding generation perceived the attributes of religious establishments to extend beyond the mere financial support of religion to matters that affected one's standing and participation in the larger political community.[37] The President, in conjunction with the other branches of government, was made subject to the Test Clause. The Framers foresaw that "without some prohibition of religious tests, a successful sect, in our country, might, by once possessing power, pass test-laws, which would secure to themselves a monopoly of

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[35] *See* Comments of James Iredell, *supra* note 22, at 193 (discussing the Test and Corporation Acts); Franck, *supra* note 5, at 615–16.

[36] U.S. Const. art VI, cl. 3.

[37] *See generally* 4 *The Founders' Constitution* 634–45 (Philip B. Kurland & Ralph Lerner eds., 2005).

all the offices of trust and profit, under the national government."[38] The Test Clause thus prevents one form of establishment by the executive.[39]

3. Barring "Congress" From Establishing Religion Comprehensively Applies to the Federal Government.

As their debates and contemporary correspondence reveal, the Founders did not consider the evils of establishments and church-state orderings restricted to expenditures by legislatures. On the contrary, their experience demonstrated that executive abuses of religious liberty were possible and that a close intertwining of legislative and executive functions also infringed on religious liberties. Because, however, the Framers did not anticipate the rise of the modern administrative state or the consequent sea change in the nature and breadth of appropriations, they reasonably thought that, under the structure of the new Constitution, Congress was the most dangerous branch.[40] They formulated the Establishment Clause with this in mind.

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[38] 3 Story, *supra* note 28, §§ 1841–43.

[39] The Framers did not view the Test Clause as the only check on the executive's ability to establish religion. The debates surrounding the Establishment Clause illustrate the applicability of the Clause to branches other than Congress: when it was suggested that the Establishment Clause bound the judiciary branch, Madison did not disagree with such an interpretation. *See* Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 889–92 (1986).

[40] The Federalist No. 51 (James Madison), *supra* note 23, at 322. Madison also said that "it is, perhaps, less necessary to guard against the abuse in the Executive Department than any other, because it is not the stronger branch of the system, but the weaker. It therefore must be leveled against the Legislative, for it is the most powerful and most likely to be abused." James Madison, *Proposal for a Bill of Rights* (June 8, 1789), *in A Second Federalist: Congress Creates a Government* (Charles Hyneman & George Carey eds., 1967).

(a) Correspondence. — The papers of the architects of the religious liberty clauses disclose no contemplation of executive establishment powers. Thomas Jefferson — often quoted for his "wall of separation between church and State"[41] — explained often that the wall was to be comprehensive: "the government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions . . . . Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government."[42] In an earlier version of Jefferson's "wall" letter, he explained even more specifically that "Congress thus inhibited from acts respecting religion, *and the Executive authorized only to execute their acts, I have refrained from prescribing even occasional performances of devotion.*"[43] In a response to criticism that he did not proscribe a day of national fasting and prayer, Jefferson again returned to anti-establishment principles: "*civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents.*"[44]

Correspondence from James Madison shows that he, too, believed that the Constitution secured religious liberty against all branches. He wrote: "Why should the expense of a religious worship be allowed for the Legislature, be paid by the public, more than that for the *Ex. or Judiciary branch of*

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[41] Thomas Jefferson, *Letter from Thomas Jefferson to the Danbury Baptists* (Jan. 1, 1802), *in Church and State in American History* 74 (John F. Wilson & Donald L. Drakeman eds., 2003).

[42] Thomas Jefferson, *Letter from Thomas Jefferson to Reverend Millar* (Jan. 23, 1808), *in Church and State in American History, supra* note 41, at 74.

[43] *See* Daniel Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* 41 (2002) (emphasis added).

[44] *Id.* (emphasis added).

the Govt?"[45] And although Madison, unlike Jefferson, eventually succumbed to popular pressure and precedent by issuing Thanksgiving Day proclamations, he "was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory."[46] But he later regretted and questioned his authority to take even this circumscribed action. In hindsight, he wrote that "[r]eligious proclamations by the Executive recommending thanksgivings [and] fasts are shoots from the same root with the legislative acts reviewed,"[47] and thus deemed the proclamations as illegitimate as legislative establishment.

(b) The Debates. — The perceived need for a constitutional guarantee against establishment in a bill of rights arose from the lack of any such express provision in the Constitution. The need itself was not universally acknowledged. Madison and others believed that, even without a bill of rights, the Constitution prevented federally sponsored religion by not expressly granting any branch the power to establish it. As Madison explained during the Virginia ratifying convention, "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation."[48] But when the first Congress turned its attention to a bill of rights, Madison recognized that

> "some of the State Conventions . . . seemed to entertain an opinion that under the clause of

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[45] James Madison, *Madison's "Detatched Memoranda"*, 3 Wm. & Mary Q. 534, 559 (Elizabeth Fleet ed. 1946) (ca. 1817) (hereinafter "Madison, Detatched Memoranda") (emphasis added).

[46] *Letter from James Madison to Edward Livingston* (July 10, 1822), *in* 9 *Writings of James Madison* 100–03 (Gaillard Hunt ed. 1910). In the same letter, Madison explained he felt compelled to "follow the example of predecessors." *Id.*

[47] Madison, Detatched Memoranda, *supra* note 45, at 560.

[48] 11 *Papers of James Madison* 130–31 (William T. Hutchinson ed., 1977).

> the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish a national religion."[49]

The rest of the debate in Congress proceeded on the conclusion that the threat of national establishment *vel non* came from Congress. In a speech before the House of Representatives, while introducing his draft of the proposed amendment, Madison described the purpose as "to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[50] Madison drew no distinction between the executive and legislative branches and spoke generally of Government, and of the powers that should be withheld from the federal government as a whole, and the remaining debates disclose absolutely no attention to such a distinction.[51]

The debates in the States over the Constitution and, later, over the provision that would become the Establishment Clause continued to center on federalism rather than separation-of-powers concerns.[52] Those debates shed further light on the original understanding of the purpose of the Estab-

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[49] 1 *Annals of Congress* 729–31 (Joesph Gales ed., 1789).

[50] *Id.* at 437.

[51] *See, e.g.*, 1 *Documentary History of the First Federal Congress of the United States of America* 136, 151–66 (L. Grant De Pauw ed., 1972); 3 *id.* at 288.

[52] *See* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. Church & St. 311, 313–21 (2000) (compiling authorities for this proposition). As these debate occurred prior to the application of the Bill of Rights to the states via the Fourteenth Amendment, the Anti-Federalists were focused on retaining the right, in each individual state, to legislate on religious matters.

lishment Clause — to effect a bar that applied to the federal government as a whole.

During Virginia's Constitutional Convention, Madison insisted that, "were uniformity of religion to be introduced by this system, it would, in my opinion, be ineligible . . . . This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it."[53] Though he was speaking before the Bill of Rights was introduced, Madison left no doubt that he believed that religion was outside the purview of the entire federal government.

Even the Anti-Federalists in Virginia, while worrying about the precise language of the Establishment Clause, understood that it was designed to serve their interests in keeping the new national government out of religion. As one group of eight state Senators explained, the Clause

> "does not prohibit the rights of conscience from being violated or infringed: and although it goes to restraining Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination . . . might be so favored and supported by the General Government . . . and in process of time render it as powerful and dangerous as if it was established as the national religion of the country. . . . This amendment then, *when considered as it relates to any of the rights it is pretended to secure*, will be found totally inadequate."[54]

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[53] Neil H. Cogan, *The Complete Bill of Rights* 69 (1997) (quoting Madison).

[54] Journal of the Senate of the Commonwealth of Virginia, Begun and Held in the City of Richmond, on Monday, the 18th of October . . . 1789, at 62 (Richmond, 1828) (emphasis added).

The Virginian Anti-Federalists — though worried that an aggressive national government would exploit the wording of the Establishment Clause to subvert its protections — nonetheless understood the intended scope of those protections. The Clause was intended to prohibit establishment by the federal government.

Likewise, in North Carolina's ratification convention, the debate turned to whether religious and civil liberties would be secured by the Constitution. Responding to the question of whether "the general government may not make laws infringing" religious liberties,[55] Richard Spaight explained that "[a]s to the subject of religion . . . . [n]o power is given to the *general* government to interfere with it at all. Any act of Congress on this subject would be a usurpation."[56] Spaight believed that the Constitution, because it did not explicitly grant a power regarding religion to the national government, protected religious liberty because the states retained that power. This observation, which was typical of Anti-Federalists, reflects the common understanding that the federal government, as a whole, would be restricted from acting on religious issues by the Constitution.

Pennsylvania ratified the Constitution, but a strong and vocal minority issued a dissenting report offering recommendations to the federal delegation, one of which read "[t]he right of conscience shall be held inviolable, and neither the legislative, *executive* nor judicial powers of the United States shall have authority to alter, abrogate or infringe any part of the constitution of the several States, which provide for the preservation of liberty in matters of religion."[57] Although the perspectives of this minority did not win the day in that state, they made clear those clamoring for a bill of rights believed

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[55] Debates in the Convention of the State of North Carolina, July 30, 1788, 4 *Elliot's Debates* 191.

[56] *Id.* at 208 (emphasis added).

[57] 1 *The Complete Anti-Federalists* 22 (Herbert J. Storing ed., 1981) (emphasis added).

that all branches of government, not just the legislative branch, should be restricted from usurping state rights in the area of religion.

At New York's ratification convention, one member stated that he "could have wished also that sufficient caution had been used to secure to us our religious liberties, and to have prevented the *general* government from tyrannizing over our consciences by a religious establishment."[58] This too indicates that the fear of religious establishment was not unique to the legislative branch, but to the government as a whole.

Ultimately, in this context, the Anti-Federalists believed that they had retained authority over religion as residual state sovereignty.[59] Had the Framers intended to limit Congress while leaving the President unrestricted regarding establishment of religion, that decision would have had enormous implications for the federalism debate and would necessarily

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[58] Neil H. Cogan, *The Complete Bill of Rights*, *supra* note 53, at 62 (emphasis added).

[59] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 16 n.54 (1998) (compiling authorities for this proposition). Historians immediately after ratification also realized this implication. *See, e.g.*, 3 Story, *supra* note 28, § 1873 ("In some of the states, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife, and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of religious tests. Thus, *the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions*; and the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship." (emphasis added)).

have required discussion of that specific delineation of power. The legislative history does not indicate that the Framers intended to make that distinction, nor that they conceived that the debate would ever turn on such terms. Indeed, the legislative history indicates just the opposite: The Framers wanted disestablishment to apply to the "general" government, including the executive branch.

These generalized concerns about governmental infringements on religious liberty — legislative and executive alike — are also reflected in state constitutional history. The debates regarding Virginia's decision whether to establish religion provide substantial guidance as to the intended meaning of the Establishment Clause. James Madison again played an important role. In his *Memorial and Remonstrance Against Religious Assessments*, he wrote that as "[r]eligion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former."[60] Madison continued, arguing that "[r]eligion be not within the cognizance of Civil Government."[61] Madison along with others at the Founding believed that establishment should be prohibited to the national government as a whole, to all branches of government, not specifically or uniquely to the legislature.

Madison's *Memorial and Remonstrance* was successful, and the bill that he militated against was defeated. In its place, a bill drafted by Thomas Jefferson guaranteeing reli-

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[60] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 8 *Papers of James Madison* 298 (William T. Hutchinson et al. eds., 1973) (hereinafter "Madison, Memorial and Remonstrance"). The *Memorial and Remonstrance* was written in opposition to a bill, introduced in the General Assembly of Virginia, to levy a general assessment for the support of teachers of religions.

[61] *Id.*

gious freedom was enacted.[62] Jefferson explained in his bill's preamble that

> "the impious presumption of legislators *and rulers*, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking, as the only true and infallible, and as such, endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world."[63]

Jefferson's broad language — embracing both "legislators and rulers" — defines the threat to religious freedom as one that comes from government generally, and not from any particular branch. His words reflect the experience of the colonists and the founding generation that involvement in religion by any branch of government carries with it the risk of oppression.

In other states, the majority of provisions regarding rights of conscience and disestablishment spoke in generic terms applicable to all levels of government.[64] Article I of the 1792

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[62] Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *in* 2 *Papers of Thomas Jefferson* 305 (Julian P. Boyd et al. eds., 1950).

[63] *Id.* (emphasis added). As Jefferson himself noted, his bill — though "drawn in all the latitude of reason and right" — "still met with opposition" and underwent "some mutilations" in the time between his initial draft of the Bill, in 1779, and its ultimately enacted form in 1785. *See* Thomas Jefferson, *Autobiography* (1821), *in* 1 *Works of Thomas Jefferson* 71 (Plaul Leicester Ford ed., 1904–05). Notwithstanding these "mutilations," the final act contained the same language respecting legislators and rulers. *See Virginia, Act for Establishing Religious Freedom* (Oct. 31, 1785), *in* 8 *Papers of James Madison* 399–401 (William T. Hutchinson et al. eds., 1973).

[64] *See* 1–7 *The Federal and State Constitutions* 568, 800–801, 1689, 1889, 2454, 2597, 3100, 3752 (Francis Newton Thorpe ed., 1909) (repro-

Delaware Constitution expressly required that "no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control, the rights of conscience, in the free exercise of religious worship . . . ."[65] Similarly, Article I of the 1790 Pennsylvania Constitution mandated that "no human authority can, in any case whatever, control or interfere with the rights of conscience."[66] These state constitutional provisions evince the common understanding that threats to religious liberty via establishments came from governments generally, not solely through legislative acts.

The striking common thread in this history is the lack of any discussion of a carve-out for executive support of religion. Without any historical context, two inferences from that silence might be possible — an implicit blessing of executive establishment, or confidence that such a thing was impossible. Given the actual historical record, however, only the latter is plausible. James Madison — the same person who believed that a bill of rights was unnecessary because the

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ducing Constitutions of Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, and Vermont). Article IV, section 10, of the Georgia Constitution of 1798 is representative: "No person within this State shall, upon any pretense, be deprived to the inestimable privilege of worshipping God in a manner agreeable to his own conscience, nor be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tiths (sic.), taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to so. No one religious society shall ever be established in this State, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles." 2 *id.* at 780. Connecticut and Rhode Island did not draft constitutions until the nineteenth century; South Carolina proclaimed the establishment of the "Christian Protestant religion" in article XXXVIII of its 1778 constitution. 6 *id.* at 3255.

[65] 1 *id.* at 568.

[66] 5 *id.* at 3100.

Congress had no power to establish religion in the first place — played a large role in drafting the Establishment Clause. To impute a secret design by the author of the *Memorial and Remonstrance Against Religious Assessments* to provide in the executive branch a safe haven for national religion is to pervert history.

II. THE FRAMERS MADE NO DISTINCTION BETWEEN TAX DOLLARS EXPENDED INTERNALLY OR EXTERNALLY FOR RELIGIOUS PURPOSES.

It is well recognized that the Establishment Clause was designed in part to prevent government from being able to "force a citizen to contribute three pence only of his property for the support of any one establishment."[67] Whether the government should be able to use those three pence to support religion internal or external to the government was in fact a matter of some debate before and after adoption of the First Amendment. Ultimately, the decision was to bar any use of tax funds to support religion.

The English model had featured a church that was in a very real sense "internal" to the government. As outlined above, the crown was the head not only of the government, but of the Church of England. Even as power devolved to Parliament over time, the Church of England grew no more "external" to the government. Indeed, as recognized by Justice Story,

> "[a]t common law the church of England, in its aggregate description, is not deemed a corporation. It is indeed one of the great estates of the realm; but it is no more, on that account, a corporation, than the nobility in their collective capacity. . . . In this sense the church of England is said to have peculiar rights and privileges, not as a corporation, but

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[67] Madison, Memorial and Remonstrance, *supra* note 60.

> as an ecclesiastical institution under the patronage of the state."[68]

Thus, far from enjoying immunity from the efforts of those who sought disestablishment, "internal" expenses toward the establishment of religion were the central evil against which those efforts were aimed.

Virginia's own debate on establishment is again illuminating. In May of 1784, only shortly before Jefferson's Bill for Establishing Religious Freedom ultimately secured total defeat of state-supported religion, the legislature was actively considering at least two other alternatives. The first would have restored a modified state establishment — *i.e.*, an "internal" church.[69] The second — which ultimately manifested itself in a bill supported by Patrick Henry entitled "Bill Establishing a Provision for Teachers of Religion" — would have provided for a general assessment for the support of churches without designating a "state" church.[70] Thus, while no "internal" church would be formed, "external" churches would have been able to depend on financial support from the taxpayers. This second variant — which came to be known as the General Assessment Bill — enjoyed substantial support and appeared poised to become law. In the wake of Madison's *Memorial and Remonstrance*, however, and following Patrick Henry's departure from the legislature upon his election as governor, the General Assessment Bill lost out to Jefferson's Bill for Establishing Religious Freedom.[71] This precursor to the Establishment Clause comprehensively abolished state support of religion — whether for internal or external religious causes.

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[68] *Town of Pawlet* v. *Clark*, 9 Cranch 292, 325 (1815).

[69] *See* Charles Fenton James, *Documentary History of the Struggle for Religious Liberty in Virginia* 122–23 (1900).

[70] *Id.* at 122–23, 129–30. The taxpayer could elect the designee of his tax dollars.

[71] *Id.* at 140–41.

Furthermore, although the debates over the First Amendment's ratification shed little light on the distinction between funds spent on religion internally and those spent externally, James Madison addressed the issue in the years after his Presidency. Although he acknowledged that the practice of paying for a Congressional chaplain[72] had become an established precedent "not likely to be rescinded" — a forecast later proven quite prescient by this Court in *Marsh* v. *Chambers*, 463 U.S. 783 (1982) — he could justify it only on the basis of "*de minimis non curat*" — *i.e.*, the law does not concern itself with trifles.[73] In addressing directly whether the practice was permitted under the Establishment Clause, he was unequivocal:

> "Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principles of religious freedom?
>
> "In strictness the answer on both points must be in the negative. The Constitution of the U. S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment . . . [?]"[74]

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[72] As a governmental employee with no duties to the public – *i.e.*, no "external" duties – the Congressional chaplain signifies an "internal" expense for religious purposes.

[73] *Letter from James Madison to Edward Livingston*, *supra* note 46.

[74] Madison, Detatched Memoranda, *supra* note 45, at 558. Though this Court upheld the practice of state-financed legislative chaplains in *Marsh*, it did so on the basis of history alone, and not because the practice is consistent with the principles of the Establishment Clause. *See Marsh*,

Finally, it is plain that the character of the resistance to expenses in support of religion — internal or external — could not hinge on whether Congress or the executive branch purported to authorize it. As outlined in the previous section, the structure of the Constitution left no fear that the executive would ever be free independently to authorize the use of taxpayer dollars. The vesting of the appropriation power in Congress was thought to be "the great bulwark which our Constitution had carefully and jealously established against Executive usurpations."[75] The President's use of taxpayer money to establish religion would have been no less anathema to the Framers simply because the program was termed "internal" to the federal government.

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463 U.S. at 795–96 (Brennan, J., dissenting) (describing the Court's holding as defining the practice to be "an exception" to the Establishment Clause in light of its "unique history").

[75] 3 *Annals of Congress* 938 (1793) (statement of James Madison).

CONCLUSION

For the reasons stated, this Court should affirm the ruling of the Court of Appeals.

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